

No. 128413

IN THE

SUPREME COURT OF ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of
	)	Illinois, No. 2-20-0748.
Respondent-Appellee,	)	
	)	There on appeal from the Circuit
-vs-	)	Court of the Seventeenth Judicial
	)	Circuit, Winnebago County, Illinois,
	)	No. 10 CF 2437.
JAMES AGEE,	)	
	)	Honorable
Petitioner-Appellant.	)	Debra D. Schafer,
	)	Judge Presiding.

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**REPLY BRIEF FOR PETITIONER-APPELLANT**

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**ARGUMENT**

**Post-conviction counsel failed to provide a reasonable level of assistance by failing to plead an essential element of a claim that counsel added to James Agee’s amended post-conviction petition.**

The State agrees that post-conviction counsel must provide a reasonable level of assistance when counsel adds a new claim to an amended post-conviction petition. (St. Br. 7). The parties disagree about whether Agee’s post-conviction counsel failed to provide a reasonable level of assistance when counsel omitted an essential element of the claim that trial counsel was ineffective for failing to pursue a second degree murder defense. (St. Br. 11; Pet. Br. 20). This Court should hold that post-conviction counsel’s failure to properly plead a claim that counsel added to a petition constitutes unreasonable assistance under the Post Conviction Hearing Act (“Act”) and Illinois Supreme Court Rule 651(c) (West 2018). Further, this Court should find Agee’s post-conviction counsel provided unreasonable assistance, and therefore, it should reverse the petition’s dismissal and remand Agee’s case for further second stage post-conviction proceedings and the appointment of new post-conviction counsel.

**A. This Court should hold in accordance with longstanding post-conviction jurisprudence that the reasonable assistance standard applies when post-conviction counsel adds a claim to a petition.**

As the State concedes, post-conviction counsel should provide a reasonable level of assistance when counsel adds a new claim to an amended petition. (St. Br. 7). The State correctly asserts, “[W]here counsel has included a claim in an amended petition, counsel has necessarily determined that it constitutes one of the “petitioner’s claims” for purposes of Rule 651(c).” (St. Br. 9). Further, the

State notes, “To hold otherwise would require courts to second-guess counsel’s identification of the petitioner’s claims. And a rule requiring courts to reevaluate counsel’s identification of the petitioner’s claims, determine whether any of those claims are “new,” and exclude any “new” claims from the scope of counsel’s obligation to provide reasonable assistance, would be difficult to apply.” (St. Br. 9-10). Indeed, this Court “. . . has long held that, at all stages of postconviction proceedings, defendants are entitled to a reasonable level of attorney assistance.” *People v. Urzua*, 2023 IL 127789, ¶ 57. Thus, in *People v. Addison*, 2023 IL 127119, ¶ 23, this Court recently found post-conviction counsel’s performance unreasonable where counsel drafted an amended petition that failed to avoid the procedural bar of forfeiture.

The appellate court in Agee’s case concluded, without citation to authority, “Defendant is incorrect that Rule 651(c)–or the Act, for that matter–requires any level of representation by counsel in the presentation of new claims.” *People v. Agee*, 2-20-0748, ¶ 8 (Dec. 23, 2021) (summary order). The appellate court’s holding left Agee with no remedy for counsel’s failure to properly plead a potentially meritorious ineffective assistance of counsel claim and conflicts with this Court’s longstanding jurisprudence that the Act depends on post-conviction counsel providing reasonable assistance to ensure that potentially viable claims are heard on their merits. *See People v. Johnson*, 2018 IL 122227, ¶ 17 (counsel at the first stage of post-conviction proceedings required to provide a reasonable level of assistance); *People v. Cotto*, 2016 IL 119006, ¶ 42 (both retained and appointed counsel are required to provide reasonable assistance); *People v. Perkins*, 229 Ill.2d 34, 49 (2007) (post-conviction counsel must attempt to show an

untimely *pro se* petition was not due to the petitioner’s culpable negligence); *People v. Suarez*, 224 Ill.2d 37, 43 (2007) (post-conviction counsel’s filing of an amended petition did not satisfy Rule 651(c) when nothing in the record showed counsel consulted with the petitioner about his claims); *People v. Lander*, 215 Ill.2d 577, 584 (2005) (post-conviction counsel is required to satisfy Rule 651(c) even when the *pro se* petition was untimely); *People v. Turner*, 187 Ill.2d 406, 414 (1999) (post-conviction counsel failed to provide a reasonable level of assistance when counsel “. . . failed to make a routine amendment to the post-conviction petition which would have overcome the procedural bar of waiver and elected to stand on a *pro se* petition, which omitted essential elements of petitioner’s constitutional claims and contained virtually no evidentiary support”); *Addison*, 2023 IL 127119, ¶ 23; *Urzua*, 2023 IL 127789, ¶ 57; (Pet. Br. 14-15).

Therefore, this Court should accept the agreement of the parties that post-conviction counsel must provide reasonable assistance when counsel adds a claim to a petition.

**B. Agee’s post-conviction counsel performed unreasonably by failing to plead all of the legal elements required for a claim counsel added to the amended petition.**

In Agee’s case, post-conviction counsel’s amended petition added the allegation that trial counsel was ineffective for failing to inform Agee about a second degree murder defense. But post-conviction counsel failed to allege Agee had a viable defense—a necessary element of the ineffectiveness claim. (C. 276).

In its arguments to the circuit court, the State argued that Agee’s amended petition should be dismissed because it failed to establish that he had a valid defense. (R. 561, 564; C. 582-87). Nonetheless, the State’s response brief contends

that post-conviction counsel's pleading of the claim was adequate and therefore counsel provided Agee with a reasonable level of assistance. (St. Br. 11). The State reasons, "Although the amended petition did not use the words 'viable defense,' in asserting that petitioner 'could pursue' a second degree murder defense, C278, the petition plainly implied that such a defense was viable." (St. Br. 14).

But it was not enough for post-conviction counsel's pleadings to merely imply the defense was viable. The Post-Conviction Hearing Act requires that the petition must ". . . clearly set forth the respects in which petitioner's constitutional rights were violated." *People v. Reed*, 2014 IL App (1st) 122610, ¶ 57 (quoting 725 ILCS 5/122-2 (West 2010)). Alleging claims with unsupported elements would not rise to the level of a substantial showing of a constitutional violation, sufficient to survive the second stage of post-conviction proceedings. Indeed, such incomplete allegations are not even sufficient to survive the low standard to survive summary dismissal at the first stage of proceedings. *People v. Cole*, 2012 IL App (1st) 102499, ¶ 14 ("implicit" claims do not establish even the gist of a constitutional violation).

The appellate court recognized counsel's duty to explicitly plead each of a claim's elements in *People v. Dixon*, 2018 IL App (3d) 150630. There, the court found post-conviction counsel unreasonable where he "failed to allege the basic elements of the claims it raised," such as the prejudice element to support an ineffective assistance of counsel claim and the facts of the arrest to support a lack-of-probable-cause claim. *Dixon*, 2018 IL App (3d) 150630, ¶¶ 17-20. Because the petition's claims were conclusory and contained "virtually no specific factual

allegations,” counsel did not fulfill his basic duty to put the claims in proper legal form. *Id.* ¶ 17.

Thus, contrary to the State’s argument, it is not enough for counsel to imply the basic elements of a post-conviction claim. Reasonable counsel must make sure to plead facts to support each element of the allegation.

Here, when arguing trial counsel failed to pursue an available defense, post-conviction counsel merely named the defense, writing that, “. . . at the time of Davis’ death, Defendant was acting under a sudden and intense passion due to being seriously provoked by Davis.” (C. 278). Counsel did nothing to establish or even imply that the defense would have been viable based on the particular facts of Agee’s case. To put Agee’s claim in its proper legal form, counsel needed to assert facts that would have amounted to a defense based on serious provocation. For instance, in *People v. Hall*, 217 Ill. 2d 324, 336 (2005), this Court addressed a similar post-conviction claim of trial counsel’s ineffectiveness with regard to pre-plea advice. There, the defendant argued that he had a viable defense to aggravated kidnapping based on the factual allegation that the defendant did not know a child was inside the car, and this Court found the allegations sufficient to advance to an evidentiary hearing. *Hall*, 217 Ill. 2d at 336, 340.

The State also contends that post-conviction counsel substantiated Agee’s claim with evidence. (St. Br. 15). The State notes that counsel attached to the petition Agee’s 87-page statement to the police as well as Agee’s affidavit vaguely asserting that he “blacked out” at some point prior to Davis’ death. (St. Br. 15). Contrary to the State’s claim, however, simply attaching such evidence, without any attempt to specifically link it to the petition’s allegations, did nothing to shape

the ineffectiveness claim in its proper form and present it to the court.

The State also argues, “. . . counsel’s statements do not reflect that counsel was aware of relevant evidence that he failed to provide.” (St. Br. 15). But post-conviction counsel told the court:

But again, you know, at this stage, Judge, this is the second stage, and again I only have the information that I have available to me to work with. But I would ask the Court to consider advancing this at least to a third stage where the Court could actually hear from Mr. Agee directly as to what his thoughts, his feelings, were when he was represented during the pretrial stages and the time leading up to his plea. (R. 574).

Post-conviction counsel also argued a judge or jury would not have found Agee guilty of first degree murder because, “I think that there would’ve been certainly other options and other evidence that might’ve been able to be presented.” (R. 573). Counsel also stated, “You know, I’m not going to get into the facts as [the prosecutor] alleges them. Those facts never came out at trial so I don’t think that they’re particularly relevant at this point.” (R. 571). Reasonable post-conviction counsel would have pled in the petition the “other evidence” that supported the claim that Davis provoked Agee to support the ineffective assistance claim. (R. 573). Yet post-conviction counsel’s arguments to the court, asking for an evidentiary hearing to hear Agee’s “thoughts” and “feelings,” reflect an unawareness that specific factual allegations showing Agee had a potential defense were required to advance the claim to an evidentiary hearing. *See Urzua*, 2023 IL 127789, ¶ 63 (finding counsel’s performance unreasonable where he wrongly argued that an unnotarized statement by a witness supporting an innocence claim was adequate to survive a second stage dismissal).

The State next contends that Agee's unreasonable assistance claim must fail because the underlying ineffectiveness claim lacks merit. (St. Br. 16).

However, any inquiry into the underlying merits of the claim is premature because of counsel's basic failure to properly shape the claim. As this Court has repeatedly held, ". . . remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit."

*Suarez*, 224 Ill.2d at 47; *Turner*, 187 Ill.2d at 414; *Addison*, 2023 IL 127119, ¶ 34; *Urzua*, 2023 IL 127789, ¶ 65; (Pet. Br. 27). In Agee's case, it remains to be seen whether this ineffective assistance of counsel claim has merit because of counsel's inadequate presentation of the claim. It is impossible to speculate as to whether his petition would have stated a substantial constitutional violation had counsel adequately presented this claim by alleging that Agee had a viable defense, a required element of the claim. *Turner*, 187 Ill.2d 406; *Hall*, 217 Ill.2d at 335-36; *Rissley*, 206 Ill.2d at 459-60; *Hughes*, 2012 IL 112817, ¶ 64; *Brown*, 2017 IL 121681, ¶ 45; *Hatter*, 2021 IL 125981, ¶ 26. Because Agee has rebutted the presumption that counsel complied with Rule 651(c), remand is required, without regard to the merits of the claim.

In any event, the State's attempts to refute Agee's ineffectiveness claim miss the mark. The State argues, ". . . the record affirmatively rebuts petitioner's claim that he was unaware of a second degree murder defense before trial" because "[t]he circuit court noted petitioner's motion filed shortly after the guilty plea, which claimed that he had not wanted to plead guilty because he believed that his actions constituted second degree murder or involuntary manslaughter."



(St. Br. 17). But Agee's *pro se* motion to reconsider sentence which never received a ruling on its merits, actually corroborates his post-conviction claim. Agee's motion argued the sentence was excessive because Agee did not want to plead guilty to first degree murder ". . . owing to my belief the charge should have been reduced to second degree murder, or involuntary manslaughter, due to the incident deriveing [*sic*] from a domestic dispute." (C. 218). The motion reflects Agee's personal belief in a second degree murder defense, which is wholly consistent with the claim advanced in his post-conviction petition. Contrary to the State's argument, the motion did not rebut Agee's claim because it did not speak to trial counsel's advice. That is, Agee's motion did not state trial counsel discussed a second degree murder defense with Agee prior to the guilty plea.

Finally, the State argues that trial record, specifically the trial court's rulings that Agee's confession and evidence of stalking would be admitted at trial, forecloses any possibility that Agee would have been convicted of second degree murder. (St. Br. 19-20). To the extent that there may be circumstantial evidence weighing against a verdict of second degree murder, that has no bearing on this claim. To establish prejudice from trial counsel's inadequate advice, Agee is not required to show the absence of evidence of guilt, but rather need only show "the articulation of a plausible defense that could have been raised at trial." *Hall*, 217 Ill. 2d at 335-36. Given that credibility determinations may not be made at the second stage, that the evidentiary record in this case is sparse as a result of the guilty plea, and that post-conviction counsel failed in his duty to plead the prejudice element of Agee's claim, it would be inappropriate to reject Agee's claim on the basis of prejudice at this point in the proceedings.

For these reasons, this Court should hold that post-conviction counsel

failed to provide Agee with reasonable assistance, reverse the petition's dismissal, and remand the case to the circuit court for further second stage post-conviction proceedings and the appointment of new post-conviction counsel.

**CONCLUSION**

For the foregoing reasons, James Agee, petitioner-appellant, respectfully requests that this Court hold that post-conviction counsel failed to provide Agee with reasonable assistance, reverse the petition's dismissal, and remand the case to the circuit court for further second stage post-conviction proceedings and the appointment of new post-conviction counsel.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 10 pages.

/s/Sean Collins-Stapleton  
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JAMES AGEE,	)	
	)	Honorable
Petitioner-Appellant.	)	Debra D. Schafer,
	)	Judge Presiding.

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**NOTICE AND PROOF OF SERVICE**

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On June 27, 2023, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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